1981

Rosalind Jackson v. Virginius "Jinx" Dabney and James N. Barber : Brief of Defendant and Respondent Virginius "Jinx" Dabney

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

ROSALIND JACKSON,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
VIRGINIUS "JINX" DABNEY,	:	Case No. 17601
	:	
Defendant-Respondent,	:	
	:	
and	:	
	:	
JAMES N. BARBER,	:	
	:	
Defendant.	:	

BRIEF OF DEFENDANT AND RESPONDENT VIRGINIUS "JINX" DABNEY

Ray R. Christensen
CHRISTENSEN, JENSEN & POWELL
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendant and Respondent

Michael J. Wilkins
Suite 1020
Continental Bank Building
200 South Main Street
Salt Lake City, Utah 84101
Attorney for Plaintiff and Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

ROSALIND JACKSON,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
VIRGINIUS "JINX" DABNEY,	:	Case No. 17601
	:	
Defendant-Respondent,	:	
	:	
and	:	
	:	
JAMES N. BARBER,	:	
	:	
Defendant.	:	

BRIEF OF DEFENDANT AND RESPONDENT VIRGINIUS "JINX" DABNEY

Ray R. Christensen
CHRISTENSEN, JENSEN & POWELL
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendant and Respondent

Michael J. Wilkins
Suite 1020
Continental Bank Building
200 South Main Street
Salt Lake City, Utah 84101
Attorney for Plaintiff and Appellant

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF TEXTS CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

ROSALIND JACKSON, Plaintiff-Appellant, vs. VIRGINIUS "JINX" DABNEY, Defendant-Respondent, and JAMES N. BARBER, Defendant.	:	Case No. 17601

BRIEF OF DEFENDANT AND RESPONDENT
VIRGINIUS "JINX" DABNEY

STATEMENT OF THE NATURE OF THE CASE

This is an action for professional negligence or legal malpractice.

DISPOSITION IN THE LOWER COURT

The trial court granted a summary judgment in favor of defendant-respondent Dabney and against the plaintiff, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent Dabney seeks an affirmance of the judgment below.

STATEMENT OF FACTS

The statement of facts contained in appellant's brief is not complete, and in order to advise the Court fully as to the factual background out of which this case arises we deem it necessary to restate the facts.

We recognize that on this appeal plaintiff and appellant is entitled to have the evidence and all reasonable inferences therefrom viewed in a light most favorable to her, and that if, in any view of the evidence, a fair-minded jury could find in her favor, and against the respondent, the judgment should be reversed. The facts set forth below are either established without contradiction in the record, or if there is a dispute in the facts, we have stated plaintiff's version of the facts for purposes of this appeal.

The facts upon which the trial court based its ruling are contained in allegations and admissions in the pleadings, answers to various interrogatories propounded by one party to the other, and the testimony of the plaintiff on her deposition. The pages of the deposition are not separately numbered as part of the record. References to the record will be prefaced by the letter "R," and to plaintiff's deposition by the abbreviation "Depos."

This action was initiated by the plaintiff as a malpractice action against two separate attorneys, defendant and respondent Dabney, and James N. Barber. (R. 2-4). Prior to trial, summary judgment was entered in favor of defendant Dabney and

against the plaintiff, no cause of action. (R. 155-156). The action as against defendant Barber came regularly on for trial, and was compromised and settled by the parties during trial for the amount of $4000. (R. 178, 181). Plaintiff then commenced this appeal as against defendant Dabney. (R. 182-183).

Plaintiff first consulted with defendant Dabney in approximately 1975. (Depos. 12). At that time, she and her husband were the joint owners of a residential property located at 3201 Whitehall Drive. (Depos. 4). Plaintiff and her husband had acquired the property by purchasing the prior owner's equity for $2,100, and assuming the balance owed on the mortgage of $17,000. (Depos. 10). At the time plaintiff first consulted Dabney, this residential property was encumbered not only with the unpaid mortgage lien, the balance of which was then about $12,000, but also by numerous judgment liens and tax liens. (Depos. 10, 14 and 15; Exhibit 1 to deposition; R. 44 to 45 and 63 to 68).

The particular event which caused plaintiff to consult Dabney initially was threatened foreclosure of a judgment lien in favor of one Orson Gygi. Dabney made appropriate arrangements for settlement of that claim. (Depos. 16).

Because many of the judgment liens were then several years old, Dabney recommended that nothing be done about the others at that time, and that they be permitted to expire by a lapse of time, if this was possible. However, plaintiff desired to have all of these liens removed, if possible, and insisted that Dabney write to all creditors and attempt to compromise all

of the judgment debts for about 20 percent. Dabney, in accordance with her desires, undertook to do this, but only one creditor responded. (Depos. 19 to 28; R. 70 to 80).

Dabney faithfully reported to plaintiff the results of his efforts as evidenced by a series of letters. (Depos. Exhibits 5 to 14; R. 69 to 80). The last letter was dated May 3, 1977. (Depos. 30; Depos. Exhibit 14; R. 80).

Plaintiff's next contact with Dabney was in June 1978, more than a year later, after she received notice of a sheriff's sale. This was in connection with the foreclosure of another judgment lien in favor of Grill Advertisement. She took the foreclosure papers to Mr. Dabney, and he indicated that he would attempt to compromise the matter with the judgment creditor's attorney and have the foreclosure sale called off. In her presence, he called the other lawyer and asked him if he would stop the sale for cash payment of $400. Dabney advised her that the other lawyer had agreed to do so. She then delivered to Mr. Dabney $400 in cash to stop the foreclosure sale. A few days later Dabney called her and advised that the judgment creditor's lawyer had forgotten to stop the sale and that her house had been sold. (Depos. 31 to 33; R. 139-141).

Dabney then advised her that the best thing that she could do at that point was to try to raise the $1,100 necessary to redeem the home by December of that year. (R. 127; Depos. 34). $1,100 represented approximately the full amount of the judgment, accrued innterest, and costs. When plaintiff apprised

her husband of this, he advised her to go to defendant Barber and get the matter straightened out. (Depos. 34). Within one or two weeks thereafter, she went to see Barber, and took all of the pertinent documents to him. (Depos. 35; R. 20, 115). He told her there was nothing to worry about. She contacted Barber frequently thereafter, and on a daily basis from December 1 to December 13, the last day of the redemption period. She had borrowed the $1,300 necessary to redeem the house. (Depos. p. 34 to 36). However, she never received advice or instruction from Barber as to the procedure to be followed in accomplishing the redemption, with the result that the redemption period expired, and her ownership rights were permanently extinguished.

After Dabney advised her in June of 1978 that she had to come up with $1,100 to save her home, she had no further dealings with him. (R. 127). "After that I talked to him no more." (Depos. 37). Thereafter plaintiff relied upon Barber's "assurance that he was looking into the matter and would see that it was taken care of." (Plaintiff's answers to Barber's interrogatories No. 7; R. 20).

She never advised Dabney that she had raised the money to redeem the property, and never sought his advice or assistance in accomplishing this.

In Summary:

(1) Plaintiff's home was encumbered with liens in excess of her equity in the home at the time she first consulted

Dabney. All of the liens long antedated the engagement of Dabney's services, and he was in no wise responsible for their existence.

(2) Judgment lien foreclosure proceedings were pending when plaintiff first consulted Dabney. He undertook to compromise and settle the judgment claim for $400. Either through misunderstanding with the attorney representing the judgment creditor, or because of breach of faith on his (attorney for judgment creditor) part, Dabney was unsuccessful in achieving compromise settlement and preventing the foreclosure sale.

(3) Thereafter, both Dabney and Barber repeatedly advised the plaintiff that she could redeem the property by paying off the full amount of the judgment, accrued interest, and costs, in the approximate amount of $1,100.

(4) After the foreclosure sale, plaintiff had no further dealings with Dabney, and relied upon the advice of Barber to save her home. For reasons not explained, she failed to pay the $1,100 amount, and her home was lost.

On this state of the record, defendant Dabney moved for a summary judgment contending, first, that there was no evidence in the record of any negligence upon his part; and secondly, that even if his handling of the matter could be found to be negligent, plaintiff sustained no damages as a result thereof or, at the most, no more than about $700, that is the difference between the proposed compromise settlement figure of $400 and the actual amount of the judgment lien. The trial court ruled in favor of

Dabney and entered judgment in his favor and against the plaintiff. (R. 155 to 156). Following trial and settlement of plaintiff's claim against Barber, this appeal was initiated (R. 182).

ARGUMENT

Plaintiff has broken her argument up into three separate points or headings. As we view the matter, there is only one single issue before the Court--whether there is any evidence in the record that defendant Dabney was guilty of legal malpractice, and, if so, whether plaintiff sustained any damage as a result thereof. We, therefore, do not subdivide our argument into separate points.

Our research has not discovered any case closely similar in point of fact to the case at bar. However, this case is somewhat analogous to the recent decision of this Court in the case of Hughes v. Housley v. Glen and Cotro-Manes, 599 P.2d 1250 (1979). In that case, a claim was asserted against third-party defendant (successor attorney to the defendant and third-party plaintiff) for his failure to set aside a default judgment which occurred during the time that defendant and third-party plaintiff represented the plaintiff in the action. This Court observed that the position of the claimant, or third-party plaintiff, was no worse for third-party defendant's lack of success in failing to get the default judgment set aside. So here, at the time plaintiff consulted with defendant, there was already a judgment

of record against plaintiff which was a lien on her property in the principal amount of approximately $750. Plaintiff did not have and could not raise the full amount necessary to satisfy the judgment before foreclosure sale. (R. 140; Depos. 32). The failure of the defendant to compromise and settle the action left plaintiff in no worse position than she was before she consulted defendant. Paraphrasing the language of Hughes v. Housley, it may be said:

> "For assuming arguendo that Cotro-Manes [Dabney] was negligent in his handling of the case, his negligence cannot be said to have aggravated Hughes' [plaintiff's] injury or added to the damage." p. 1253.

We agree with appellant's contention that legal malpractice consists of the failure to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake, and that when such failure proximately causes damages, it gives rise to an action in tort. (Appellant's Brief p. 5). However, plaintiff produced no evidence by way of affidavit, deposition or otherwise, that this defendant was guilty of any negligence or bad faith in his representation of the plaintiff. No evidence was produced that ordinary care required that defendant reduce the proposed settlement agreement to writing, or that he check with the sheriff to determine that the foreclosure sale had been cancelled, or that he appear at the time and place of the foreclosure sale. Experience teaches that settlement agreements are commonly made among lawyers orally, and although

they are ordinarily ultimately reduced to writing, time constraints sometimes prevent their being formalized in writing prior to the occurrence of a specific event. After the foreclosure sale, he advised her fully and completely as to her rights, and had she followed his advice her home would have been redeemed within the redemption period.

Under any view of the evidence, the very most that could be said against defendant Dabney is that he was unsuccessful in his efforts to effect a compromise settlement of the judgment debt for $400, and therefore plaintiff became obligated to pay the total sum of approximately $1,100 in order to protect her home from loss by foreclosure sale. Assuming that the failure to consummate the settlement resulted from Dabney's negligence, the damage to the plaintiff would be the difference between the amount of the proposed settlement agreement of $400 and the amount which would have been necessary to redeem the property ($1,100).

It must also be remembered that at the time of the foreclosure sale there were many other liens against the plaintiff's home, exceeding in total the value of her equity in it. Had Dabney been successful in discharging the lien in question, undoubtedly others would have been asserted and other foreclosure proceedings brought.

Also to be remembered is that if Dabney had been successful in consummating a settlement of the judgment debt for $400, or any other sum less than the amount of the judgment, he

certainly would have been entitled to a reasonable attorney's fee. The record shows without dispute that he has been paid nothing for his services. The reasonable value of his services in effecting a settlement would be a proper offset against any amount which plaintiff would be entitled to recover. Mullen and Levit, Legal Malpractice, §§ 147-148, p. 213.

Plaintiff did not have, and does not claim to have, any valid or meritorious defense to the judgment debt. She was in no worse position by Dabney's having failed to compromise it than she was before she came to him. It is not malpractice to fail to secure a favorable result for a client when a client has no valid position; and if it can be said that Dabney was in any way negligent, plaintiff's recovery should be limited to nominal damages only. See 7 Am.Jr. 2d Rev. Ed., p. 270, Attorneys at Law, § 226.

Plaintiff's loss of her home resulted wholly from her own negligence in failing to follow the advice of Mr. Dabney and Mr. Barber to pay the amount of the judgment debt and costs in the amount of $1,100 prior to the expiration of the redemption period. That portion of the loss, resulting from her own negligence must be borne by her. As said in Mullen & Levit, Legal Malpractice, § 151, p. 217:

> "There are occasions when the plaintiff through his own neglect may have increased or failed to reduce his damages. Consequently, the amount which is attributable to the plaintiff, and not the attorney, should be deducted from the total damages. These damages are those which are increased by the plaintiff's contributory negligence or which should have been mitigated by the plaintiff." (Emphasis added.)

In summary, we respectfully submit:

1. Plaintiff has demonstrated no negligence or bad faith upon the part of Dabney and therefore has shown no basis for recovery against him.

2. Judgment was entered against plaintiff and was a lien upon her property long before she consulted with Dabney, and his failure to accomplish a compromise settlement of the judgment debt left her in no worse position than she was before she consulted him.

3. Even if it can be said that defendant Dabney was negligent in failing to consummate a settlement on behalf of the plaintiff for $400, or some other figure less than the amount of the judgment debt, his maximum liability to the plaintiff would be the difference between the amount of the proposed settlement agreement ($400), and the amount that was necessary to redeem the property by reason of the failure of the settlement agreement ($1,100), or $700, less an offset for reasonable attorney's fees.

Although it is unquestionably true that where there are disputed issues of fact a case cannot be determined by summary judgment, and must be submitted to a trier of fact on its merits; it is equally true that summary judgment serves the salutary purpose of saving both courts and litigants the time, trouble, and expense of trial, where there are no genuine issues of fact. And unsworn statements in pleadings cannot stand in the face of sworn testimony by way of affidavit, answers to interrogatories, or deposition. Dupler v. Yates, 10 Ut. 2d 251, 351 P.2d 624 (1960),

and Transamerica Title Ins. Co., 24 Ut. 2d 346, 471 P.2d 165 (1970). We submit that this case is of the latter type.

CONCLUSION

For the reasons above set forth, the judgment below should be affirmed.

Respectfully submitted,

CHRISTENSEN, JENSEN & POWELL

By _____
Ray R. Christensen
900 Kearns Building
Salt Lake City, Utah 84101
Telephone: 355-3431

CERTIFICATE OF SERVICE

This is to certify that on the ___ day of July, 1981, two true and correct copies of the foregoing Brief of Defendant and Respondent Virginius "Jinx" Dabney was mailed, postage prepaid to the following:

Michael J. Wilkins
Suite 1020
Continental Bank Building
200 South Main Street
Salt Lake City, Utah 84101